CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 323

FAIRCHESTER OIL CO., INC.,
Petitioner,

against

FIRST NATIONAL BANK OF NEW ROCHELLE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

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August 4, 1944.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Fairchester Oil Co., Inc. respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of New York, County of Westchester, entered in the above action on June 5, 1944, upon the remittitur of the Court of Appeals of the State of New York, affirming a judgment of the Appellate Division of the Supreme Court of the State of New York for the Second Department which reversed a judgment at Trial Term of said Supreme Court of the State of New York, Westchester County, dismissing the complaint in said action, and directed judgment in favor of the respondent and

against petitioner for the relief demanded in the complaint therein. A certified transcript of the record is furnished herewith in accordance with Rule 38, par. 1, of the Rules of this Court.

STATEMENT

This case involves whether a lease of certain premises for use as a gasoline filling and service station, permitting cancelation if "at any time * * * the use of said premises as an oil and gasoline filling and service station * * * is prohibited, limited or restricted by governmental authority * * *", could properly be terminated by reason of regulations issued under the Second War Powers Act (56 Stat. 176, 50 U. S. C. § 631) by the War Production Board and by the Office of Price Administration of the United States Government.

In March, 1942, the War Production Board, Division of Industry Operation, issued "Limitation Order L-70", which limited the quantity of gasoline to be delivered to any service station to 80% of the "normal gallonage" of the station and restricted the hours of operation of a station to not more than 12 hours of any calendar day or not more than 72 hours in any calendar week (7 Fed. Reg. 2103-2105). Thereafter, during the next succeeding four months, the delivery of gasoline to service stations was further limited by amendments to Order L-70 to 50% of the "normal gallonage" (7 Fed. Reg. 2722, 3549-3550, 4171, 5552-5556) until July, 1942, when the "Gasoline Rationing Regulations" of the Office of Price Administration became effective (7 Fed. Reg. 5216, 5225-5243).

During the period involved in this litigation, the latter regulations did not change the 12 and 72 hour restrictions during which service stations could distribute gasoline, but did introduce the "coupon" rationing system. Such system further restricted the basis upon which stations could obtain gasoline. They provided, speaking generally, for the issuance of basic rations, and in some instances supplementary rations, to owners of all motor vehicles. They further provided for delivery of motor fuel to service stations only in such quantities as was represented by consumer coupons which the stations had to surrender to the wholesaler who made delivery.

The Trial Court decided this action in favor of the petitioner (R 15), with an opinion (R 70-72) to the effect that the foregoing regulations restricted the use of the premises as a gasoline filling and service station and permitted termination.

The Appellate Division reversed (R 84-85) without, we respectfully submit, giving adequate consideration to the important issues involved. This is evidenced by the fact that it adopted a "per curiam" opinion (R 79-81) in which, after quoting the material clause permitting termination if

> "the use of said premises as an oil and gasoline filling and service station * * * is prohibited, limited or *restricted* by governmental authority",

the Court concluded that there was no right to terminate for the reason, as expressed by the Court (R 81), that

> "these regulations did not prohibit nor make illegal the business of the defendant, but merely *restricted* it".

The Court of Appeals affirmed the Appellate Division without opinion (R 88-89). It held, therefore, that none of the above-described regulations justified cancelation of the lease herein.

Precisely the contrary was held by the Supreme Court of Minnesota in a detailed and well reasoned opinion in *Orme* v. *Atlas Gas & Oil Co.*, Minn. , 13 N. W. (2d) 757 (March 24, 1944). Unfortunately, this decision by Minnesota's highest Appellate Court had not been reported at the time briefs were submitted, or at the time oral argument was had, in the Court of Appeals. Photostatic copies of the decision, however, were sent to the Court of Appeals as soon as it came to our attention, approximately one week prior to the affirmance of the judgment herein by said Court.

We submit that this case merits review, particularly in view of the conflict of decisions now existing. Leases of the character involved here and in the *Orme* case are well known throughout the oil industry. It is altogether unsatisfactory that the right to terminate them by reason of action of the Federal government should vary among the individual States.

THE FACTS

Respondent's assignor, as landlord, and petitioner, as tenant, entered into a written lease on November 6, 1935, covering premises on the East Boston Road at Mamaroneck, New York, to be used as a gasoline filling and service station (R 48-56). The lease was to run for approximately 10 years and was to expire on March 31, 1945 (R 49). The rental provided in the lease was based upon the gallonage sold, with a guaranteed minimum (R 49-50).

Paragraph 10 of the lease gave petitioner an option to cancel under the following circumstances (R 53):

> "10. If at any time after the execution of this lease by the Lessee, the use of said premises as an oil and gasoline filling and service station or the driveways and/or approaches thereon or thereto is prohibited, limited or restricted by governmental authority or by decree of any court or for any other cause except on account of the Lessee's fault or neglect, or if at any time during the term of this lease any portion of said premises is taken by lawful authority for any public improvement and the remaining portion thereof not so taken shall not be sufficient, in the Lessee's opinion for the Lessee to conduct its business thereon, then the Lessee shall have the option of terminating and cancelling this lease on and as of the date the right to maintain said station, driveways or approaches is so denied or said premises are so taken. In the event of termination or cancellation for any of the causes enumerated in this paragraph the Lessee shall be liable only for the rental accrued and earned to the date of termination and cancellation of this lease."

On or about April 1, 1942, following the issuance of Limitation Order L-70 by the War Production Board, petitioner removed its fixtures, boarded up and abandoned the premises (R 24-25); but petitioner did not deliver up to respondent the keys to the premises until July 25, 1942 (R 28-29).

Meanwhile, respondent brought a series of four actions against petitioner for rent due from April through July, 1942 (R 16-19). None of these four actions is before the Court.

We are here concerned solely with the action originally numbered as Action 5, commenced by respondent subsequent to its receipt of the keys to the premises on July 25, 1942, for rent claimed to be due on August 10, 1942, and September 10, 1942, for the months of August and September, 1942 (R 12, 6, 7, 9). Petitioner defended this action on the ground that it had a right to terminate the lease by reason of the Federal regulations heretofore described, and that it did so terminate no later than July 25, 1942 (R 12, 63-69).

JURISDICTION

Jurisdiction of this Court is invoked under Judicial Code § 237 (b), as amended (36 Stat. 1156, 38 Stat. 790, 39 Stat. 726, 42 Stat. 366, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. § 344 (b)).

QUESTION PRESENTED

Whether in a contract of lease expressly allowing cancelation if "at any time * * * the use of said premises as an oil and gasoline filling and service station * * * is prohibited, limited or restricted by governmental authority * * *", the Courts may properly hold that the privilege of cancelation is excluded where the limitations and restrictions relied upon are those of the War Production Board and of the Office of Price Administration of the United States Government.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The State Court has decided a Federal question of substance not heretofore determined by this Court.

2. Conflicting decisions by the highest appellate Courts of two States with respect to a Federal question of public importance calls for an exercise of this Court's power of supervision.

3. The decision in this case is not in accord with applicable decisions of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, County of Westchester, White Plains, New York, commanding said Court to certify and send up to this Court on a date to be designated, a full and complete transcript of the record and of all proceedings had in this case, to the end that this case may be reviewed and determined by this Court; that the judgment below be reversed; that the judgment entered April 5, 1943 dismissing the complaint in this action on the merits be reinstated and affirmed; and that your petitioner be granted such other and further relief as may seem proper.

WM. DWIGHT WHITNEY,
Counsel for Petitioner,
15 Broad Street,
New York, N. Y.

August 4, 1944.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, Westchester County, has been reported at 180 Misc. 670, 46 N. Y. Supp. (2d) 451. The *per curiam* opinion of the Appellate Division, Second Department, of the Supreme Court of the State of New York has been reported at 267 App. Div. 281, 45 N. Y. Supp. (2d) 532. The Court of Appeals of the State of New York wrote no opinion.

ARGUMENT

POINT I

THIS COURT HAS JURISDICTION.

A situation analogous to the present one occurred in *Railroads* v. *Richmond,* 15 Wall. 3, where this Court expressly held that it had jurisdiction over the case. It appeared that a railroad company had entered into a written contract with the owners of a grain elevator near the Mississippi River at a time when there was no railroad bridge crossing the River. The contract provided that the owners of the elevator should have the handling of all "through" grain, *i.e.,* grain ferried across the River, and that the railroad company would pay them a certain price per bushel for receiving and discharging it. While this contract was in force, Congress enacted legislation which resulted in the building of a railroad bridge across the River and thereafter the railroad company found it unnecessary to use the services of the elevator. The elevator owners sued the

railroad company for breach of contract. The railroad company contended that the contract had been nullified by the later legislation. The Supreme Court of Iowa decided the case in favor of plaintiffs, and thereafter it came before this Court on writ of error to the Iowa Supreme Court. The elevator owners moved to dismiss on the ground that "the record did not show a state of facts that made any act of Congress apply to the case" (15 Wall. at 6). In denying the motion, this Court stated:

> "The defendants in error move to dismiss the writ of error on the ground that the 'record does not show a state of facts, that makes any act of Congress apply to the case.' The record does show, however, that the present plaintiffs in error claimed in the State court, that contracts made with the defendants in error had been rendered void and of no force and effect by provisions of the Constitution of the United States, and of certain acts of Congress, approved June 15, 1866, and July 25th, 1866, and also that the decision of the Supreme Court of Iowa, denied this claim. The motion to dismiss must, therefore, be Denied."* (15 Wall. at 7).

Again, in *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, suit was brought in a State Court for breach of an express contract to repurchase certain bonds at maturity, at par and accrued interest. Defendant, a national bank, contended that the contract was *ultra vires* and void because in violation of the statute authorizing national banks to carry on a banking business. In holding for the defendant, this Court expressly stated (p. 213):

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*This Court subsequently affirmed the Supreme Court of Iowa on the merits, 19 Wall. 584.

> "* * * we have jurisdiction of the cause to review the ruling of the state court that the express contract was rendered invalid by the federal statute."

The fact that the present case differs from the foregoing in that it involves regulations issued by Federal agencies instead of statutes adopted by Congress is not a ground of distinction. Indeed, it is well established that "a valid legislative regulation, that is, one made pursuant to constitutional and statutory authority, has the same force as though prescribed in terms by statute." 1 *Von Baur, Federal Administrative Law* (1st Ed., 1942) § 492.

POINT II

THIS COURT SHOULD REVERSE THE DECISION BELOW.

We frankly recognize that at first sight the question involved *appears* to be solely one of construction of the lease, and therefore one of local law. So the State Court thought, for it denied our petition to amend its remittitur to show that a federal question had necessarily been decided by it, 112 New York Law Journal 133 (July 21, 1944).

What we ask this Court to decide, is whether there is not a far deeper and more significant Federal question *implicit* within the ostensibly local question, in that *under the guise* of construing a lease, the State Court is in effect interposing an obstruction to the full application of regulations issued under the Second War Powers Act. If the lease is construed as the Minnesota State Court construed it (and we do not think that there can be a serious conten-

tion that the two leases are in any way different), the *effect* is to give application to such regulations.

We entirely agree that there ought not to be a deliberately forced construction of the lease in order to bring the cancelation clause within the Federal regulations. But that the construction for which we contend is not a forced one, is evidenced by its adoption by the Minnesota State Court, as well as by its adoption by the Trial Court in this case.

What we sense in the decision (without opinion) by the Court of Appeals, and in the *per curiam* opinion by the Appellate Division, in this case, is the application of a distinctively *local* point of view in construing the lease. This is evidenced by the reliance placed by both the Appellate Division, Second Department in this case, and by the Appellate Division, First Department, in *Robitzek Investing Co.* v. *Colonial Beacon Oil Co.*, 265 App. ~~Div. 749~~, 40 N. Y. Supp. (2d) 819 (cited with approval by the Appellate Division in our case), upon local zoning laws as having been the objective of the parties in adopting the clause to be construed.

The case might be put in this way. Any construction of a written contract requires the Court to approach the contract from a background of the law to be applied to the construction. In this case, one discerns an approach by the New York State Appellate Courts to this problem of construction as made primarily with State laws in mind,—hence the adoption of the local zoning regulating conception as decisive.

We suggest that the decision calls for correction because it overlooks the controlling importance of the Federal question arising out of the exercise of the war powers. If one

approaches this paragraph of the lease, bearing fully in mind that the war situation, and the Federal legislation which recognizes it, constitute the governing background of policy and law, then we submit that one must reach the result reached by the Minnesota Appellate Court and not that which was reached by the New York Appellate Courts. Read fairly and objectively, in the light of such a background, it is really impossible to say that this lease did not contain appropriate provision to call into play the privileges accorded *in the national interest* by regulations under the Second War Powers Act.

Respectfully yours,

WM. DWIGHT WHITNEY,
Counsel for Petitioner,
15 Broad Street,
New York, N. Y.

August 4, 1944.

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CHARLES ELMORE CROPLEY
CLERK

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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August 26, 1944.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The petitioner applies to review a decision of the New York Court of Appeals holding that under the terms of a lease of a gas station which gave a privilege of cancellation under stated circumstances (R. 53) petitioner was not justified in attempting to cancel because of the issuance of Limitation Order L-70 by the War Production Board, which limited the amount of gasoline deliverable *to* service stations and the hours during which such gasoline was deliverable *by* such stations (R. 67).

The Facts

We point out in addition to the facts detailed in the petition herein, that the petitioner failed to deliver possession of the demised premises until July 25th, 1942 (R. 71) altho Limitation Order L-70 became effective March 19,

1942 (R. 67) and the lease provided that cancellation should be had "on and as of the date the right to maintain said station * * * is so denied" (R. 53).

Jurisdiction

This Court is without jurisdiction herein because (1) No federal question was raised below. (2) No federal question arises in this case. (3) Decision of the alleged federal question would not be decisive of the case.

(1)

The petition herein fails wholly to comply with Rule XII, Paragraph 1 of this Court as required by Rule XXXVIII, Paragraph 2 thereof.

The petitioner makes no effort to point out from the record where the supposed federal question propounded was brought to the attention of the Courts below and an examination of the record discloses the impossibility of so doing.

The record contains no certificate by any Court that any federal question was presented to it. Application was made to the New York Court of Appeals to amend the remittitur by adding thereto "that the Court determined that Paragraph 10 of the contract of lease must be construed as excluding from its scope regulations issued under the Second War Powers Act by the War Production Board and the Office of Price Administration of the United States Government". This application was denied (New York Law Journal, July 21, 1944, Vol. 112 p. 17) on the ground "that the proposed question is not one of federal cognizance".

It follows that upon this record, no question is presented which this Court may review.

McGoldrick v. *Gulf Oil Corporation,* 309 U. S. 2.

(2)

The supposed federal question propounded by petitioner is not within the concept of Section 237 (b) of the Judicial Code inasmuch as it involves no question of interpretation or validity of any federal statute or regulation nor does it affect any privilege or immunity arising by reason thereof.

The sole question of interpretation involved was purely a State question of the meaning of a lease. The meaning of the federal regulation was never in dispute nor raised by petitioner.

(3)

Decision of the alleged federal question suggested by petitioner would not necessarily be decisive of this case. The entire controversy may well have been and perhaps was disposed of upon the ground that petitioner failed to avail itself of the terms of the privilege of cancellation under Paragraph 10 of the lease assuming arguendo that it had any such privilege.

ARGUMENT

The question suggested by petitioner is not a federal one.

As we have shown, the record as presented by this Court fails utterly to disclose that any federal question was disposed of by any of the Courts below and we believe the petition must be dismissed on this ground.

The petitioner asks this Court (petition 10) to *imply* a federal question on the ground that the decision herein under "guise of construction" is really based upon a federal consideration and in effect is interposing an obstruc-

tion to the full application of a regulation issued under the Second War Powers Act. The fallacious nature of this contention is exposed when it is observed that the decision below in fact has not impaired, limited or in any wise obstructed the actual enforcement of Order L-70. It has not authorized the delivery of any greater quantity of gasoline to the service station nor the delivery therefrom during a greater period than that authorized by the Order.

As we read the petition and accompanying brief, this is the sole ground relied upon for invoking the jurisdiction of this Court.

The decision in this case, however, is concerned not with the federal order but with the provisions of the lease itself. It is plain from the opinion of the Appellate Division (R. 79-81) that its decision was to the effect that the terms of the lease contemplated "real property" restrictions and not business regulations. The petitioner has never contended that the effect of Federal Order L-70 was other than a regulation of business. There never was any dispute as to the meaning or effect of Order L-70. Petitioner has never contended and does not now contend that any of the Courts below erroneously interpreted the provisions of that Order. The controversy thruout the litigation has been as to whether Paragraph 10 of the lease was broad enough to embrace a regulation clearly directed to the business conducted upon as distinguished from a restriction upon the demised premises, qua real estate.

Any business regulation would have raised the same question of interpretation whether it emanated from a federal or local statute or from a rule or regulation of the federal government of the state government or from a local agency. The circumstance, therefore, that a regulation of business arose from a federal order authorized by a federal statute is purely fortuitous and the question of law determined was clearly interpretation of the terms of the lease proper, a state question, pure and simple. Peti-

tioner does not contend that independently of Article 10 of the lease it would have any right of cancellation, a fact which emphasizes the purely local nature of the question at issue and the absence of any federal question.

We think that neither *Railroads* v. *Richmond*, 15 Wall 3, nor *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, supports petitioner.

The fact that in the former case this Court refused to dismiss the writ of error does not authorize the contention that certiorari ought to be granted in the case at bar in view of the present much more stringent rules regarding jurisdiction, particularly since upon consideration of the merits (19 Wall 584) this Court held that no federal question was involved, in other words that the federal statute did not *ex proprio vigore* authorize repudiation of the contract.

The *Awotin* case is obviously not in point since there the National Bank was prohibited by the federal statute from engaging in the transaction there involved.

We think our contentions are supported by the Supreme Court of Minnesota in the case of *Orme* v. *Atlas Gas & Oil Co.*, 13 N. W. (2d) 757, cited by petitioner and upon which it relies so heavily. It carefully considered (p. 764) the Robitzek case (cited by the Appellate Division herein, R. 81) but carefully distinguished the provisions in the lease before it from the language of the lease in the Robitzek case and stated that consequently it did not consider the Robitzek case in point because while the Robitzek lease did not embrace business regulations the terms of the Orme lease clearly did so.

This also disposes of the contention raised by the petitioner (p. 7) that conflicting decisions by the highest Appellate Courts of two States exist with respect to a "federal" question. There is no conflict. The Orme case reconciles its decision with the Robitzek case and *neither*

Court suggests that the question is a federal one. Even if there were a conflict between the Orme decision and that at bar it is of course not the function of this Court to resolve conflicts between state Courts on purely local questions. Neither Minnesota nor New York is required to follow the other. The "distinctly local point of view" (Pet. brief, p. 11) is precisely what New York is entitled to maintain.

The affirmance below by the Court of Appeals without opinion was under well settled principles not necessarily adoption or affirmance of the grounds of decision by the Appellate Division.

Assuming that the Court of Appeals was in accord with the Appellate Division it may also have decided the case upon another ground which is clearly a non-federal question and that is, that regardless of the scope of the privilege of cancellation granted by Paragraph 10 of the lease, petitioner never properly *availed* itself of the privilege.

Altho L-70 became effective March 19, 1942, the Trial Judge found (R. 71) that defendant, petitioner failed to surrender possession of the premises until July 25th, 1942. The option under its terms was to be exercised "on and as of the date" that the contingency arose. It was urged before the New York Court of Appeals, as well as the lower courts by this respondent, that the defendant (here the petitioner) never did make timely exercise of its right of cancellation and hence lost such right if ever it had any. Particularly in the absence of a certificate from the Court of Appeals, we submit its decision may well have been based upon this ground. It is well supported by authority that a privilege to cancel a lease must be exercised in the manner and within the time prescribed by the instrument which created the privilege.

Goelet v. *Spofford*, 55 N. Y. 647;
The Woodbridge Co. v. *Charles F. Hires Co.*, 19 App. Div. 128 (unanimously affirmed 163 N. Y. 563);

Fine Realty Co. v. *City of New York*, 53 Misc. 246;

Fidelity & Columbia Trust Co. v. *Levin*, 128 Misc. 838 (unanimously affirmed 221 App. Div. 786 and unanimously affirmed 248 N. Y. 551);

Aee Holding Corporation v. *Texas Company*, 150 Misc. 526;

Butler & Herman Co. v. *Meth*, 122 N. Y. Supp. 271 (not officially reported).

If this contention is correct (and its correctness is wholly for determination by the State Court) decision of the question sought to be given consideration by petitioner would not be decisive of the litigation and therefore not reversible error.

CONCLUSION

For the foregoing reasons, this application should be denied.

Respectfully submitted,

WARNER PYNE,
HENRY D. HOLDEN,
MONROE J. CAHN,
Counsel for Respondent.

Dated, August 26, 1944.